REPLY BRIEF OF APPELLANT

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

16-646

DANIEL R. BARNETT,

Appellant,

v.

ROBERT A. MCDONALD,
SECRETARY OF VETERANS AFFAIRS,

Appellee.

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APPELLANT'S REPLY ARGUMENTS

I. The Board misinterpreted the law when it failed to consider the provisions of 38 C.F.R. § 3.317 (2016) in adjudicating the Veteran's claim, and the issue was reasonably raised.

The Secretary suggests that the Board did not err when it failed to consider service connection for the Veteran's sleep apnea under the provisions of 38 C.F.R. § 3.317 because the issue was neither raised by the Appellant nor the record. Sec. Brief at 7-13. He contends that the Veteran fails to identify anything in the record that suggests the issue of entitlement to service connection pursuant to the Medically Unexplained Chronic Multisymptom Illness ("MUCMI") provision of § 3.317 was raised. Sec. Brief at 7. This ignores the contention in the Veteran's opening brief, that he was exposed to environmental hazards during service in the Persian Gulf and that this may have been the cause of his diagnosed obstructive sleep apnea, because the etiology and pathophysiology of the condition remain uncertain. Apa. Open Brief at 7-8; *see* R-458; R-414.

The law is clear that under 38 C.F.R. § 3.317 and 38 U.S.C. § 1117, service connection may be awarded for Gulf War veterans who experience certain diagnosed illnesses with inconclusive etiologies. As discussed in the Veteran's opening brief, the burden is not on the Veteran to directly "claim" exposure to environmental hazards and tie it to a current disability. Rather, the burden is on VA to be "vigilant" in determining whether there is such a connection, particularly in cases where exposure to environmental hazards has been reported. Apa. Open Brief at 13-14; *see also* VA

Training Letter 10-03, "*Environmental Hazards in Iraq, Afghanistan, and Other Military Installations,"* April 26, 2010. The training letter further provides that "not all Veterans will be aware of such exposure or will associate such exposure with particular disabilities," and instructs regional office personnel to be "vigilant" in reviewing such claims. *Id.* The Secretary's argument, that the Veteran effectively needed to "claim" entitlement to consideration under § 3.317, ignores the Secretary's own guidance on the matter. *See also Robinson v. Mansfield*, 21 Vet.App. 545, 552 (2008) (The Board is required to construe a veteran's arguments "in a liberal manner for purposes of determining whether they raise issues on appeal.").

The Secretary further suggests that the Veteran cannot demonstrate prejudice to his claim because "obstructive sleep apnea does not qualify for consideration pursuant to 38 C.F.R. § 3.317 as it is 'attributed to a known clinical diagnosis' and does not qualify as a MUCMI." Sec. Brief at 8. He further posits that regardless of whether Mr. Barnett's chronic disability is caused by an undiagnosed illness or MUCMI, its attribution to a known clinical diagnosis alleviated the Board of any obligation to discuss the provisions of this regulation. Sec. Brief at 9. This is not the correct interpretation of the relevant law.

There is no dispute that Mr. Barnett is diagnosed with obstructive sleep apnea. R-262. The Secretary takes great pains to describe the meaning of etiology and pathophysiology, none of which is disputed by the Veteran. Sec. Brief at 9-10. He then suggests that the June 2013 VA examiner adequately explained the etiology and

pathophysiology of Mr. Barnett's condition, suggesting that this takes his obstructive sleep apnea outside the realm of the MUCMI provisions. Sec. Brief at 11-12. However, a plain reading of the examiner's opinion demonstrates that the examiner was speaking generally about the causes of sleep apnea, and opining that it is not generally caused by stress. R-26. She opined that the Veteran's sleep apnea less likely than not had its onset during service, but based this only on the fact that the Veteran spent a small percentage of his entire life on active duty. *Id.* This opinion only discusses the causes of sleep apnea in general and only suggests that the Veteran's stress was not the cause of his sleep apnea. It does not discuss what the cause of his sleep apnea *actually is*. Thus, the etiology and pathophysiology of the condition remains uncertain, contrary to the Secretary's argument. Sec. Brief at 11.

In support of his argument, the Secretary offers his own unsupported interpretation of the language of § 3.317. He notes that the Appellant appears to suggest that the etiology of an individual's claimant's condition is of paramount concern, while "the plain language of § 3.317 does not relate to knowledge of the etiology or pathophysiology of an individual Veteran's condition, but of the MUCMI itself." Sec. Brief at 11. He posits that "[a]ny other interpretation of the regulation would read out the bright line rule provided regarding diabetes and multiple sclerosis" in §3.317(a)(2)(ii). Sec. Brief at 12. Simply because the provision mentions two conditions in particular does not suggest that it is intended to refer to the condition

itself as opposed to an individual veteran's circumstances. The plain language of the regulation reads as follows:

> For purposes of this section, the term medically unexplained chronic multisymptom illness means a diagnosed illness without conclusive pathophysiology or etiology, that is characterized by overlapping symptoms and signs and has features such as fatigue, pain, disability out of proportion to physical findings, and inconsistent demonstration of laboratory abnormalities. Chronic multisymptom illnesses of partially understood etiology and pathophysiology, such as diabetes and multiple sclerosis, will not be considered medically unexplained.

38 C.F.R. § 3.317(a)(2)(ii).

The Secretary's interpretation of this language is inconsistent with the regulatory history, which makes clear that VA is to address such claims on a case by case, not disease by disease, basis. The Secretary issued the regulation to "delegate[e] to VA adjudicators the authority to determine on a *case-by-case*" basis the issue of service connection for MUCMIs. 75 FR 61995-01, 61995-96 (Oct. 7, 2010). The Secretary neither said nor implied that service connection was to be determined on a *disease-by-disease* basis. The Secretary, in the comments to the final rule, stated, "it is solely a medical determination whether that illness [other than chronic fatigue syndrome, fibromyalgia, or irritable bowel syndrome] qualifies under revised § 3.317((a)(2)(i)(B) as a 'medically unexplained chronic multisymptom illness.'" 75 FR 61995-01. The Secretary's position in the present case is contrary to the regulatory history.

Because the Secretary's interpretation is not supported by the plain language nor the regulatory history, it should not be afforded any deference by the Court. "[I]f the meaning of the regulation is clear form its language, then that should be the end of the Court's inquiry." *Tropf v. Nicholson*, 20 Vet.App. 317, 320 (2006). Words in a regulation are given their plain, ordinary, common meaning. *Perrin v. United States*, 444 U.S. 37, 42 (1979). When a statute is ambiguous, "interpretive doubt is to be resolved in the veteran's favor." *Brown v. Gardner*, 513 U.S. 115, 118 (1994). *See also Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 146 (1991) (holding that litigating positions are not entitled to judicial deference when they are merely counsel's "*post hoc* rationalizations" for agency action and are advanced for the first time on appeal). The Secretary's argument that the regulation does not speak to an individual veteran's condition should be rejected.

Mr. Barnett's argument comes down to the point that the Board should have considered and evaluated his sleep apnea under the provisions of 38 C.F.R. § 3.317, because he served in the Persian Gulf, was exposed to environmental hazards, and his condition lacks a conclusive etiology or pathophysiology. Apa. Open Brief at 6-11. The regulation requires *only* that the condition be a "diagnosed illness without conclusive pathophysiology or etiology, that is characterized by overlapping symptoms and signs and has" certain features. Sleep apnea involves sleep disturbances and signs or symptoms involving the respiratory system, both of which are listed in the regulation as signs or symptoms that may be manifestations of a

MUCMI. Under the plain language of the regulation, a veteran's sleep apnea may qualify as a MUCMI if it meets those criteria. As such, the Board should have considered the applicability of § 3.317 in reviewing the Veteran's claim. Because the Secretary has not demonstrated otherwise, his arguments are unavailing.

II. The Board failed to ensure that the duty to assist the Veteran was satisfied because it relied on a VA examination which was inadequate for adjudication purposes.

As noted in the Veteran's opening brief, the Board's decision was based almost entirely on the June 2013 VA examination. R-7-8; R-26-27; Apa. Open Brief at 11. The examiner failed to offer any probative insight into whether the Veteran's condition was understood in terms of etiology or pathophysiology. R-26-27. Instead, she merely opined that "although within the realm of possibility, since the Veteran was on [Active Duty] 15 months of his roughly 50 years on earth, it is less likely than not that his OSA had its onset during service." R-26. The Secretary argues that the Veteran did not claim symptoms fitting the description of a MUCMI, therefore the examiner did not need to consider the applicability of 38 C.F.R. § 3.317 in rendering her opinion. Sec. Brief at 14-15. However, according to VA Training Letter 10-01, even if a claimant's disability pattern differs from one of the identified chronic conditions, it is appropriate for VA to provide an examination to determine if the disability can be characterized as a disability pattern with an inconclusive etiology or pathophysiology. Apa. Open Brief at 12. Moreover, as discussed *supra*, according to Training Letter 10-03, it is not the Veteran's duty to directly "claim" exposure to

environmental hazards and tie it to a current disability. Rather, the burden is on VA to be "vigilant" in determining whether there is such a connection, particularly in cases where exposure to environmental hazards has been reported.

Here, had the examiner been vigilant and abided by VA's own advice as set forth in the training letter, she should have considered whether the Veteran's sleep apnea could be considered a MUCMI and therefore entitled to service connection under 38 C.F.R. § 3.317. While the Secretary provides a recitation of the examiner's rationale, Sec. Brief at 15-16, this does not resolve the issue. The examiner's rationale speaks generally about the Veteran's earlier complaints, discusses the usual general causative factors for sleep apnea, and reaches a conclusion that the condition is less likely than not related to service. *Id.*; *see* R-26. While the examination arguably discusses the etiology of the condition, it says nothing of the pathophysiology specific to the Veteran's condition.

Section 3.317(a)(2)(ii) requires that the Veteran need establish *either* an inconclusive etiology *or* an inconclusive pathophysiology to be entitled to service connection for a MUCMI, not both. As the examiner's discussion of the etiology of the Veteran's sleep apnea was lacking, and there was no discussion of the pathophysiology of the condition, it is inadequate to allow the Board to determine whether the provisions of 38 C.F.R. § 3.317 may warrant a grant of service connection on a presumptive basis. *See Gutierrez v. Principi*, 19 Vet.App. 1, 6, 8 (2004) ("The regulation does not require that physicians make such a diagnosis [of an undefined

disease]. . . . [The claimant] was not required to provide evidence linking his current conditions to events during service and the Board erred by imposing such a nexus requirement."); *see also* Apa. Open Brief at 13. The examiner should have considered the applicability of 3.317 to the Veteran's condition given his service in the Persian Gulf and exposure to environmental hazards. The Board's reliance on the examiner's opinion represents a failure to comply with its duty to assist the Veteran.

III. The June 2013 VA examination failed to comply with VA guidance regarding proper rating procedures for veterans who served in the Persian Gulf, and the Board's reliance on the examination was error.

Finally, the Secretary suggests that the Appellant has failed to demonstrate error in regards to the examiner's failure to reference Training Letter 10-03. Sec. Brief at 16-19. While he effectively concedes that the examiner did not consider this information, he suggests that the Veteran has nevertheless failed to prove the inadequacy of the challenged opinion. Sec. Brief at 19. As discussed in the Veteran's opening brief, VA Training Letter 10-03 provides that when a medical opinion is obtained pertaining to chemical exposure, "Fact Sheets explaining the various environmental hazards . . . must be made available to the VA medical examiner for review." Saliently, it provides that "not all Veterans will be aware of such exposure or will associate such exposure with particular disabilities," and instructs regional office personnel to be "vigilant" in reviewing such claims. *Id.* The aforementioned Fact Sheets "ensure that such [medical] opinions are fully informed based on all known objective facts." *Id*; Apa. Open Brief at 13-14.

The Secretary faults the Veteran for not expressly raising the issue of entitlement to service connection based on environmental exposures. Sec. Brief at 17. However, this has nothing to do with the fact that the examiner should have been provided with the fact sheets in order to ensure that her opinion was "based on all known objective facts." As held by the Court, "it must be clear, from either the examiner's statements or the Board decision, that the examiner has indeed considered 'all procurable and assembled data,' by obtaining all tests and records that might reasonably illuminate the medical analysis." *Jones v. Shinseki*, 23 Vet.App. 382, 390 (2010). When the record leaves this issue in doubt, it is the Board's duty to remand for further development. *Id.* Apa. Open Brief 14-15. While the Secretary suggests that the Veteran's argument does not demonstrate the fact sheets were unknown to or ignored by the examiner, this is largely immaterial. Sec. Brief at 18. The issue is that the examiner did not comply with the guidance of Training Letter 10-03 in rendering her decision, and because the issue was in doubt the Board should have remanded the case for further development.

While the Secretary's own interpretation of the facts may lead him to conclude that the failure to consider the Training Letter did not render the examination inadequate, it is not the Secretary's role to act as fact finder, and it is not the Veteran's burden on appeal to demonstrate that he, *beyond doubt*, meets all elements of entitlement to a given benefit such that the Board's grant of the claim is a foregone conclusion on remand. *See Hensley v. West*, 212 F.3d 1255, 1263 (Fed. Cir. 2000)

(noting the "general rule that appellate tribunals are not appropriate fora for initial fact finding"); *Wagner v. United States*, 365 F.3d 1358, 1365 (Fed. Cir. 2004) ("Where the effect of an error on the outcome of a proceeding is unquantifiable, however, we will not speculate as to what the outcome might have been had the error not occurred."). The Court's review of the Board's decision should be limited to determining whether it relied on an examination that was inadequate because it failed to consider all procurable information. If the Court determines the answer to be yes, the case must be remanded for the Board to obtain an adequate examination. The Secretary's opinion as to whether this failure constituted prejudicial legal error based on the particular facts of this case should have no bearing on the Court's decision.

CONCLUSION

Based on the foregoing reasons, as well as the arguments contained in the opening brief, the Court should vacate the Board's decision and remand the appeal with instructions to readjudicate the claim in accordance with the Court's opinion.

Respectfully submitted,

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